

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

**FILED
CLERK**

4/3/2019 4:44 pm

**U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE**

CRAIG CUNNINGHAM, *on behalf
of himself and others
similarly situated,*

Plaintiff,

v.

SHORE FUNDING SOLUTIONS,
INC.,

Defendant.

Case No. 17-CV-02080 (ADS)

Central Islip, New York
March 19, 2019

* * * * *

TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY HEARING
BEFORE THE HONORABLE A. KATHLEEN TOMLINSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:

AYTAN YEHOASHUA BELLIN, ESQ.
Bellin & Associates LLC
85 Miles Avenue
White Plains, NY 10606

For the Defendant:

CLIFFORD B. OLSHAKER, ESQ.
Law Offices of Clifford B.
Olshaker
98-19 37th Avenue
Corona, NY 11368

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

**Fiore Reporting and Transcription Service, Inc.
4 Research Drive, Suite 402
Shelton, Connecticut 06484 (203)929-9992**

1 (Proceedings commenced at 10:58 a.m.)

2 THE CLERK: Calling civil case 17-2080, Cunningham
3 vs. Shore Funding Solutions, Inc. Please state your
4 appearance for the record.

5 MR. BELLIN: Good morning, Your Honor. Attan Bellin
6 for the plaintiff, Craig Cunningham.

7 THE COURT: Good morning.

8 MR. OLSHAKER: Good morning, Your Honor. Clifford
9 Olshek for the defendant, Shore Funding Solutions. How are
10 you?

11 THE COURT: Good morning. All right. I want to go
12 through the two pending motions. I'm going to make my rulings
13 now.

14 You know, looking to what this case is all about,
15 first of all, I has to do with four calls to the plaintiff
16 using an automatic telephone dialing system, although the
17 defendants contest that. Text messages were delivered to the
18 plaintiff's cell phone without the plaintiff's prior express
19 consent. All of this occurred in 2016.

20 And the injury, according to the complaint, is that
21 the -- at least the injuries plaintiff's claiming incurred was
22 that his phone was tied up for that period of time. His
23 privacy was invaded. His solitude was disturbed and his time
24 was wasted.

25 So keeping that framework in mind and looking at

1 these motions to compel, I'm going through each one of these
2 and issue a ruling. The ruling itself will be summarized in a
3 an order following this conference, and if you want to
4 substitute rationale, you can order the transcript.

5 I'll go through that now. It will be in the record,
6 but the conference summary will simply give the rulings.

7 Now, generally, I see the defendant hasn't produced
8 anything in response to the plaintiff's demands. The
9 defendant objects to the request as unduly burdensome because
10 according to counsel, the proposed discovery would only be
11 relevant if the defendant had used automatic telephone dialing
12 system, or an ATDS as it's referred to here. And the
13 assertion is that the defendant never used such a system.

14 MR. OLSHAKER: Can I speak to Your Honor for -- bery
15 briefly?

16 Recently, at the end of February this year, Judge
17 Ross in the Eastern District in Brooklyn decided the case
18 *Duran vs. La Boom Disco*, in which he dismissed a case similar
19 to this, a TCPA case based solely on text messages, as this
20 case is, on the grounds that the easy text platform is not
21 under the TCPA and automatic telephone dialing system.

22 This is the identical texting platform system that
23 the defendant uses and is in question in this case.

24 THE COURT: Well, it would have been helpful then if
25 you had put in some opposition to any of these motions,

1 wouldn't it?

2 MR. OLSHAKER: The case came out three weeks ago.

3 THE COURT: Okay. Well, you certainly could have
4 brought that to my attention, so --

5 MR. OLSHAKER: Well, I knew about this conference
6 for a while and given the adjournments, I hoped to bring it up
7 now before you made your ruling.

8 THE COURT: Look, I'm not here to dismiss anything
9 on the merits today.

10 MR. OLSHAKER: I understand.

11 THE COURT: All right? You've been through this
12 before and you said you were going to file for summary and you
13 withdrew your motion for summary judgment.

14 We're not going to play this game that, you know, on
15 the one hand you refuse to produce anything and then you
16 withhold moving forward with summary judgment motion practice.

17 MR. OLSHAKER: Well, Judge Spatt wouldn't permit me
18 to file the motion.

19 THE COURT: Well, fine. So we are where we are. If
20 you want to move to dismiss at this point, if you want to
21 bring this other case to Spatt's attention, because that's
22 his bailiwicks not mine, feel free. But today we're going
23 through the rulings on these motions and that's where we are.
24 All right?

25 MR. OLSHAKER: Fair enough. Sure.

1 THE COURT: All right.

2 To make out a claim under the TCPA, a plaintiff has
3 to show, first of all, that a defendant called her on her cell
4 phone and this a quote now from the *Rothberg* case.

5 Two, that using an automated telephone dialing
6 system, or prerecorded voice 38 without her consent. And
7 *Rothberg* is a 345 F.Supp 3d. 466 at 474, Southern District of
8 New York 2018.

9 Courts have deemed a text message a call,
10 quote/unquote, within the meaning of the statute. See, for
11 example, *Kaufman vs. Caulfire, Inc. (ph)*, 2015 Westlaw
12 6605459, Southern District of California, 2015.

13 Here, in refusing to produce any discovery by
14 categorically denying having used an ADTS, the defendant
15 opposes plaintiff's discovery request by challenging the
16 viability of the plaintiff's claims.

17 Put in another way, the defendant argues that the
18 proposed discovery is not properly discoverable since the
19 defendant didn't violate the statute. This is decidedly
20 inappropriate.

21 And I know there have been multiple references here
22 to my prior decision in a case called *North Shore Long Island*
23 *Jewish Health System vs. Mulitplan*. A discovery motion is the
24 proper forum for raising challenges to the viability of a
25 plaintiff's claims. See 325 FRD 36 at 10, Eastern District of

1 New York, 2018. Such challenges should instead be presented
2 in a proper dispositive motion before the district judge.

3 Now in looking first of all to DE-56, and I hope you
4 have a copy of it with you because I have some questions as
5 we're going along here.

6 Keeping in mind that I previously ruled, and I
7 continue to rule that the scope of discovery here will remain
8 New York State's, unless and until there is a class
9 certification motion that is approved.

10 And I know you've asked again, Mr. Bellin, for
11 nationwide discovery. This is not the time for it. If and
12 when you get finished with the New York State discovery,
13 you're in a position to apply for class certification.

14 The normal procedure here is at that time if it's
15 approved, then discovery will be reopen and you get the rest
16 of your discovery. But for now, this is where you are. All
17 right? Also keeping in mind that there's a four-year statute
18 of limitations for TCPA cases.

19 The first request, and I'm going to go response by
20 response here, seeks any and all documents, including and
21 without limitations, logs, transmission summaries,
22 confirmation sheets, invoices, billing statements and/or
23 telephone bills which reflect state or otherwise list any or
24 all wireless telephone numbers to which defendant sent or
25 caused to be sent marketing texts on behalf of the defendant

1 from April 7th, 2013 through April 7th of 2017.

2 Now right off the bat this request fails the
3 proportionality standards that went into effect in December of
4 2015 when the federal rules changed. There's no such language
5 anymore as any and all. Those words are essentially out of,
6 or should be out of any litigator's vocabulary.

7 The requests are to be tailored narrowly to what's
8 essential to prove the claims or to dispute the defenses in
9 the case.

10 Now, which of these laundry list here will show the
11 numbers of the callers who received the same four texts as the
12 plaintiff?

13 MR. BELLIN: Is that a question to me, Your Honor?

14 THE COURT: Yeah. You can stay seated.

15 MR. BELLIN: Your Honor, I have no idea. They're
16 the ones who've got those records. It wasn't a laundry list
17 for the purpose of being a laundry list.

18 It existed because I felt that Mr. Olshaker and his
19 client have been evasive up to this point. And we really need
20 to know -- this is essentially asking -- if you take away the
21 words any and all, that's fine.

22 But it's essentially asking for lists -- for any
23 documents that they have that show the telephone numbers to
24 which these marketing texts have been sent.

25 And not just these four, Your Honor. Our position

1 is it should be any marketing text because the content of the
2 marketing text is not relevant -- the specific content.
3 Rather, that their marketing text is relevant.

4 THE COURT: I understand your argument but I am
5 going to narrow this to either the same or substantially
6 similar texts that went out. That's it. All right? That's
7 the limitation that's being placed as we go through the rest
8 of these specific requests. So --

9 MR. BELLIN: I understand -- I'm sorry, Your Honor.

10 THE COURT: Go ahead.

11 MR. BELLIN: I understand, Your Honor.

12 I think the problem with that is, with all due
13 respect, is that you've limited the discovery to New York
14 State, and now you're limiting the discovery even more. In
15 terms of making a class, it makes it more and more difficult.
16 I still believe you'd be --

17 THE COURT: I'm well aware of what I'm doing.

18 MR. BELLIN: I'm sure you are, Your Honor.

19 THE COURT: Okay.

20 MR. BELLIN: That's fine.

21 THE COURT: So you know, you're not happy with this,
22 you can appeal to the district judge. All right.

23 MR. BELLIN: Very well.

24 THE COURT: All right. This is going to be narrowed
25 to documents that the defendant has that show wireless

1 telephone numbers to which the defendant sent or caused to be
2 sent the marketing texts from April 7, 2013, through April 7th
3 of 2017.

4 Again, those marketing texts are the same ones that
5 were sent to the defendant, or substantially similar ones, and
6 they are limited to New York State. And with that
7 modification, I am ordering the defendants to produce those
8 materials.

9 As to number two, which requests all documents
10 sufficient to identify each person or entity by name, address,
11 and phone number, if available, to whose cellular phone the
12 defendant sent or caused to be sent marketing texts on behalf
13 of the defendant from April 7th, 2013 through April 7th of
14 2017.

15 Once again, this is limited to New York. We're
16 talking about documents that can identify the person or entity
17 by name. I don't even know how they would have an address, but
18 as to the name and the phone number, I will require the
19 plaintiffs to produce that information.

20 As to request number three, copies of all text
21 messages delivered as a result of defendant sending, or
22 causing to be sent out, marketing texts on behalf the defendant
23 from April 7th, 2013 through April 7th of 2017.

24 What I will require the defendants to do and, again,
25 keeping in mind this is to New York State, but you are

1 directed to provide copies of the same or substantially
2 similar text messages that were sent to any consumers in New
3 York State for this relevant time period.

4 We're talking about those, as I said, that are the
5 same or substantially similar to that which was sent to the
6 defendant -- excuse me, to the plaintiff. As modified, those
7 documents are to be produced.

8 Let me just say one additional thing here. It does
9 not help the court at all that the tenets of the rules that
10 changed in December of 2015 apply to plaintiff here as well.

11 Choosing to repeat verbatim your own boilerplate
12 arguments as to why documents should be produced shows me
13 you're not in compliance with Rule 37.1 either, which is very
14 disheartening to the court.

15 The arguments were to be particularized -- it made
16 it very clear in Rule 37.1 information I provided in the prior
17 conference minute orders, your objections be particularized to
18 each request that was made here. Not this boilerplate
19 repetition that appears throughout the course of this
20 particular motion and not parroted from one to the other.

21 You know, in some respects, I could have rejected
22 this motion on that basis alone, but I find that methodology
23 is about as helpful as what I got from the defendants in the
24 responses here.

25 Number 5. Request all documents that indicate the

1 days and/or times that the defendant sent or caused to be sent
2 out marketing texts on behalf of the defendant from April 7th,
3 2013 through April 7, 2017.

4 I'm not going to require them to respond to this.
5 If the other responses are made properly, you should get that
6 information from those responses. Nor do I find the time that
7 a marketing text was sent out to be material in any way to
8 what's being raised in this case.

9 Number 9. All documents indicating how wireless
10 numbers of cellular phones were obtained to which defendant
11 sent or caused to be sent out marketing texts on behalf of
12 defendant during the period from April 7, 2013 to April 7,
13 2017.

14 You know, I'm not even sure what this means, but I
15 can tell you this. I have an inkling of what you're trying to
16 get at here and certainly that's something that should have
17 been posed in an interrogatory and I'm -- if it wasn't, then
18 this is something obviously you can ask at a deposition. But
19 it's not a proper, I think, subject of a document request. So
20 I'm not requiring to respond further to that one.

21 Number 11, all documents indicating how defendant
22 and/or the persons on defendant's behalf chose to which
23 persons and/or wireless telephone numbers to send or cause to
24 be sent marketing texts on behalf of defendant from April 7th,
25 2013 through April 7th, 2017.

1 The same principle applies here. This should have
2 been posed as an interrogatory, if it was going to be posed at
3 all. You can take it up at a deposition, but I'm not
4 requiring the defendants to do anything further with this one.

5 Number 12, all documents which relate or refer to
6 the design, the competition -- excuse me, composition and/or
7 content of the text messages attached as Exhibit A to the
8 complaint, or any identical or substantially similar
9 documents.

10 First of all, I have no idea what the design has to
11 be with any of the claims the plaintiff has raised here. I'm
12 happy to hear.

13 MR. BELLIN: Your Honor, what it has to do --

14 THE COURT: Please stay seated. I need you on the
15 microphone.

16 MR. BELLIN: I'm sorry. Courts have looked to
17 determining whether an entity or person is responsible for
18 sending out texts or faxes.

19 One of the factors they look at is who designed the
20 text and/or faxes. Numerous courts have done that and that's
21 the reason why that's relevant to this case.

22 THE COURT: So why didn't you ask that in an
23 interrogatory. I mean, it makes more sense. If you're trying
24 to get at who did this so that you can -- or somehow the
25 design is going to magically tell you who did it, I'm losing

1 as far as a document request is concerned.

2 MR. BELLIN: Well, Your Honor, the fact that
3 something can be asked in an interrogatory is not a reason
4 that the defendant is not required to produce documents that
5 reflect the answer to that.

6 THE COURT: I didn't say that. I'm telling you I'm
7 not even sure I understand what it is you're looking for and
8 how it's related here.

9 MR. BELLIN: Well, for example, emails about Gina
10 Montefiore, I want you to design the marketing texts that were
11 going to be sent out on such and such a date, or here is my
12 design of the text. What do you think of it? It shows --
13 that's the sort of thing we were looking to, Your Honor. And
14 that is relevant to who is responsible for sending these
15 things out.

16 THE COURT: Well, aren't you going to find out who
17 sent them out by virtue of the other requests that you've made
18 here, if they're responded to?

19 MR. BELLIN: Your Honor, one of the -- well, one of
20 the issues though is they had hired someone else to do it, to
21 actually physically send out the materials, that one of the
22 factors that courts look at is how involved the party was in
23 creating the text, et cetera.

24 THE COURT: Look if you are satisfied with modifying
25 this to say documents which show who designed -- if there's

1 somebody's name attached to something, the content of the text
2 message, I don't have a problem with that.

3 MR. BELLIN: That would be fine, Your Honor.

4 THE COURT: All right. Then as modified, I will
5 require the defendant to answer it.

6 Number 13, all documents which relate or refer to
7 the design, composition and/or content of all text messages
8 that were delivered, et cetera. I mean, to me this poses the
9 same issue as number 12.

10 MR. BELLIN: Yes, Your Honor. I agree.

11 THE COURT: All right. So I'm not going to require
12 them to respond further. I've already directed them to respond
13 to 12 as it's modified.

14 16, all policies of general liability insurance
15 under which you are the insured and the responses defendant
16 does not have insurance that covers TCPA claims.

17 Well, first of all, Rule 26(a) makes it very clear
18 that you're required to turn over an insurance policy, even if
19 it's a general liability policy, to opposing counsel. And
20 obviously that wasn't done here.

21 I'm going to draw your attention to a couple of
22 cases, the first one is *Calabro*, C-A-L-A-B-R-O, vs. *Stone*, 224
23 FRD 532. It's an Eastern District of New York case from 2004.
24 This is a decision of Magistrate Judge Go where this issue
25 arose.

1 And she says here at -- let's see -- at page 533.
2 "Counsel, for defendant argues that the insurance policies
3 sought are not relevant. Rule 26(b)(1) of the Federal Rules
4 of Civil Procedure permits discovery of any matter not
5 privileged that's relevant to the claim or defense of any
6 party."

7 While counsel may be correct that the policies
8 sought contain enforceable provisions excluding from your
9 coverage the accident at issue here, the plaintiff is not
10 limited to counsel's say so in making this determination.

11 As the automatic disclosure requirements of Rule
12 26(a)(1)(D) made clear, plaintiffs are entitled to inspect
13 "any insurance agreement under which any person carrying on an
14 insurance business may be liable to satisfy part or all of a
15 judgment."

16 I also draw your attention to the case, *Certain*
17 *Underwriters at Lloyds vs. National Railroad Passenger*
18 *Corporation*. This is a 2016 Westlaw 2858815. This is a
19 Eastern District case from May of 2016. It's Judge Mann's
20 decision, which holds the same principles I just recited from
21 Judge Go about inspection of the insurance policy.

22 And then the third one is *Suffolk Federal Credit*
23 *Union vs. Cumis Insurance Society, Inc.* This is a -- it cites
24 270 FRD 141. This is an October, 2010 decision of Judge
25 Boyle, again, standing for the same principle. And so you're

1 to turn over the insurance policy.

2 Number 18, all documents that pertain or relate to
3 the persons or entities who sent or caused to be sent out
4 marketing texts on behalf of the defendant from April 7th,
5 2013 through April 7th of 2017.

6 Although I find this somewhat ambiguous and
7 certainly overly broad, if you're trying to get the names of
8 the people involved, that's one thing. I assume that's what
9 you're trying to do here and my question is why did you not
10 have those names as part of the Rule 26(a) disclosures from
11 the defendant.

12 MR. OLSHAKER: Are you asking that to me, Your
13 Honor, or --

14 THE COURT: I'll ask you first.

15 MR. OLSHAKER: Your Honor, first of all, we're also
16 trying to find out the documents because documents that
17 reflect their positions in the company, you know, we don't
18 know who's involved in actually physically sending these
19 things out.

20 And so it's not only their identities, but also
21 their positions within the company.

22 But that said, I don't know that defendant -- I
23 don't know that they've identified everybody in the Rule 26(a)
24 disclosures. So I put this in here. If they have identified
25 them, then that's fine, but I still want to know more about

1 them. Who they are, what their position is in the company,
2 and I think that the documents reflecting that are something
3 they should have to produce.

4 THE COURT: All right. Well, to your recollection,
5 in terms of what you did with the Rule 26(a) disclosures --

6 MR. OLSHAKER: I believe that in the beginning with
7 disclosed it. It was a woman named Gina Montefiore, who's the
8 defendant's operations manager, who's the sole party
9 responsible within Shore Funding Solutions to generate the
10 text, and that's been disclosed from the very beginning.
11 There really is no one else.

12 THE COURT: All right.

13 MR. OLSHAKER: And I don't have any documents to
14 support that. She's just the operations manager.

15 THE COURT: All right. But that information is
16 spelled out in the Rule 26(a) disclosure, not only her name
17 but what her position is?

18 MR. OLSHAKER: I don't have it in front of me. I
19 don't recall.

20 THE COURT: Okay. Well, here's what you're going to
21 do. Go back to your Rule 26(a) disclosures and to the extent
22 that she's identified, I want you to make sure that you've
23 amended this, if it's not included, to reflect her position,
24 first of all, and what you just explained as to really what
25 would be responsive to this particular request, if this is the

1 only individual who is involved.

2 MR. OLSHAKER: Okay.

3 THE COURT: All right?

4 MR. OLSHAKER: Yeah.

5 THE COURT: All right. Down to number 19.

6 All documents that contain or refer to the
7 requirement under the TCPA, or any other law, regulation, or
8 ordinance to obtain prior express permission or invitation to
9 make telephone calls to cellular phones.

10 I think this is an impossible document request to
11 respond to, frankly. Again, to me this is something -- you're
12 trying to find out who knew about the requirements and whether
13 they were being implement properly.

14 To me that's something that should have been asked
15 in an interrogatory. Again, if you're going to do a 30(b)(6)
16 deposition or a fact deposition, you've got the opportunity to
17 ask that at the deposition, and that's where we're going to
18 leave it.

19 If you feel after doing that that somehow you're
20 still being deprived of information, then you can come back
21 and renew your request. All right?

22 Number 20. All documents that refer to the TCPA or
23 any other law, regulation or ordinance concerning the making
24 of telephone calls to cellular phones.

25 You know, we're kind of starting at the universe and

1 working our way in here. I really think this falls into the
2 same vein as what I just addressed in number 19, and that's
3 where I'm going to leave it.

4 Take it up at a deposition and if there's still an
5 issue after that, you can come back and seek further relief.

6 MR. BELLIN: Your Honor, may I just be heard for a
7 moment?

8 THE COURT: Go ahead.

9 MR. BELLIN: I think the difficulty is that I've had
10 other cases where we've had situations where they say they
11 don't know, or they didn't know about the TCPA, but then you
12 do discovery and you find emails that have been sent back and
13 forth about the TCPA, or they've gotten sued in other cases
14 through the TCPA.

15 And I think, frankly, that just asking a question at
16 a deposition will not -- it's not -- will not be sufficient.

17 And there's no way for me to know, even at the
18 deposition when they say well, we never heard of it, that
19 that's actually the case.

20 If they have emails about it, if they have
21 documentation about it, if they've been sued before under the
22 TCPA, I think I have a right to those documents to show that
23 that they had knowledge to show that they did so, sent these
24 texts out willfully or knowingly. And a question at a
25 deposition doesn't satisfy that, in my view, Your Honor.

1 THE COURT: Well, if you're going to -- my guess is
2 there aren't any policy statements floating around about the
3 TCPA with respect to what I know of this case at this point.

4 To the extent there are any emails where the parties
5 are talking to each other, named parties within the
6 defendant's business about the TCPA regulations, in that time
7 frame, then I will amend this accordingly and have the
8 defendant respond, but that's it for now. All right?

9 MR. BELLIN: Thank you, Your Honor.

10 THE COURT: 21. All documents that indicate or
11 reflect the manner or method by which you received express
12 permission or invitation to send or cause to be sent marketing
13 texts on behalf of defendant from April 7, 2013 through April
14 7, 2017.

15 I have no idea what it is you're really looking for
16 here.

17 MR. BELLIN: Your Honor, what we're looking for is
18 emails or documents that reflect getting permission --

19 THE COURT: Reflect what position?

20 MR. BELLIN: I'm sorry. Permission.

21 THE COURT: Okay.

22 MR. BELLIN: For example, do they have signed
23 documents that say we hereby give you express permission to
24 send us marketing texts, or do they have documents that say we
25 are not going to be asking for permission because we don't

1 think we want to, or things of that nature.

2 Their claim is that -- they must claim that they
3 have prior express permission or invitation. Where do they
4 have that? What reflects that? What shows how they got it?
5 Those are keys issues in this case, Your Honor. And I think
6 they should be required to produce documents reflecting that,
7 if there are any.

8 THE COURT: All right. Run this by me again as to
9 who's asking permission for what. And slow down.

10 MR. BELLIN: I'm sorry, Your Honor. I'm from New
11 York. I speak a little quickly. I apologize.

12 The TCPA requires that before an entity send out
13 marketing texts, that they get prior written express
14 permission or invitation to do so.

15 And so the defendant, in order to have a defense,
16 will have -- prior of having obtained written, prior express
17 invitation or permission, must have evidence of that prior
18 express written investigation or permission.

19 THE COURT: Is that to send out any text?

20 MR. BELLIN: That's to send out marketing texts,
21 which is what these are.

22 THE COURT: Okay.

23 MR. BELLIN: Because they're marketing rates on
24 loans and so forth. And that's under 2013 FCC rule that
25 courts have cited since then.

1 And so they -- if they have them, they have to show
2 us in the documents that reflect that prior express written
3 consent, if that's what they're claiming they have. They have
4 to claim that, otherwise their texts violate the statute.

5 MR. OLSHAKER: Your Honor, we did turn over the
6 consent that his client gave us to send text messages to him
7 in the handwritten application for funding when he applied for
8 a loan from Shore Funding Solutions, as well as the electronic
9 consent that he gave prior to receiving the first text.

10 Your Honor --

11 THE COURT: Well, hang on. Let me ask a question.

12 I understand that with respect to your client you
13 say you've turned this over.

14 When you're telling me that these are documents that
15 show that the defendant obtained express permission, from
16 whom? From each consumer that they send this to?

17 MR. BELLIN: If they're claiming -- we're entitled
18 to know if they're -- based upon what they're saying they get
19 the prior express written consent.

20 And so it's not that they -- if their position --
21 they may have used, for example, a general form. There are
22 cases where a defendant said look, we have used this form that
23 says give us permission, and that's what everybody sent us.

24 THE COURT: Yeah, but hang on. You still didn't
25 answer my question. Permission from whom?

1 MR. BELLIN: From the class members.

2 THE COURT: From --

3 MR. BELLIN: The potential class members.

4 THE COURT: All right. Here's what I will permit,
5 and that is any documents that the defendant has that shows
6 that the defendant obtained express permission to send these
7 marketing texts from anyone who would be potentially a member
8 of the New York class here for this period of time.

9 And, again, we're talking about -- just so we're
10 very clear here, the same texts or substantially similar texts
11 that the defendant received. All right.

12 MR. OLSHAKER: Thank you, Your Honor.

13 THE COURT: To the extent it's modified and,
14 hopefully, clarified there, I will require the defendants to
15 respond.

16 22, all documents that indicate or reflect the
17 manner and method by which you received the revocation of
18 prior express permission or invitation to send or cause to be
19 sent out marketing texts, blah, blah, blah.

20 What you're really looking for I take it is if
21 there's actually a response from a potential class member that
22 say don't send me any more of these.

23 MR. BELLIN: That's correct, Your Honor.

24 THE COURT: Okay. So the extent that's what you're
25 asking for, I'm modifying 22 and directing the defendant to

1 respond. 23 seems to be the same issue.

2 MR. BELLIN: Yes, Your Honor.

3 THE COURT: So if they're going to respond to 22, I
4 don't think they need to respond to 23.

5 MR. BELLIN: Yeah. 21. It's the same issue as 21.
6 That's right, Your Honor.

7 THE COURT: 21. Excuse me

8 24 -- I'm sorry. No. 24, all records and documents
9 that you contend evidence or show your receipt of the
10 revocation.

11 This seems to me, again, to be covering the exact
12 same wording as 23.

13 MR. BELLIN: Yes, Your Honor. That's fine.

14 THE COURT: All right. So no response necessary
15 there as to duplication.

16 26, all documents in your possession, custody or
17 control which evidence a prior established business
18 relationship between you and with each person or entity to
19 whose -- excuse me, particular cell phone you sent or caused
20 to be sent out marketing texts on behalf of the defendant.

21 Again, you need to define for me exactly what it is
22 you're looking for here.

23 MR. BELLIN: Your Honor, we can deny this one. It's
24 fine. I realize it's not necessary.

25 THE COURT: All right. So I'll put it down you're

1 withdrawing this, all right?

2 MR. BELLIN: Yes, Your Honor.

3 THE COURT: And 29, I have a note here. I can't
4 decipher this it says.

5 All documents in your possession, custody or control
6 that pertain and relate in any way to text messages that were
7 delivered to cellular phones or people with whom the defendant
8 had no prior business relationship, as a result of you sending
9 or causing to be sent out marketing texts.

10 MR. BELLIN: I withdraw that. I withdraw that
11 request, Your Honor.

12 THE COURT: All right. 31, all records or
13 documents, including, but not limited to, purchase orders,
14 invoices and/or cancelled checks that refer or relate to the
15 source of the names and/or wireless numbers of the persons in
16 the United States to whom you sent, or caused to be sent,
17 marketing texts of behalf of the defendant from that time
18 period. It's very unclear to me what you're looking for.

19 MR. BELLIN: Your Honor, what I'm looking for is the
20 case law says that if -- one of the ways of showing that in a
21 class case that there has not been prior express consent
22 obtained is to show that the defendant purchased the
23 commercial list, or purchased -- of companies and/or fax
24 numbers and used that list to send out the texts.

25 And so that's what I'm trying to get here. Did they

1 purchase these numbers, where did they get the numbers from?
2 Because if they did get the from some sort of other entity,
3 and purchased them, or just got lists that were available to
4 them, that would be evidence classwide of them having not
5 received prior express consent.

6 MR. OLSHAKER: Your Honor, I would say that this is
7 unnecessary because we're already being required to turn over
8 any consent, any written consent that we have for the members
9 of the potential New York class.

10 I don't see why this request -- I don't see how this
11 request moves anything along.

12 THE COURT: Well, he's looking for the source of the
13 information.

14 MR. OLSHAKER: My client --

15 THE COURT: Basically, how your client got the
16 information to send these out to specific people in the first
17 instance. That's --

18 MR. BELLIN: Yes, Your Honor. That's correct.

19 MR. OLSHAKER: And I would say it's unnecessary.
20 They either have the consent, which we'll produce, or they
21 don't have it.

22 MR. BELLIN: Well, if they're willing to concede
23 that if they don't produce consent for -- the written consent
24 that the party hasn't consented fine. But I have not -- get
25 any such concession. So I have a right to be able to prove

1 this in a variety of different ways.

2 THE COURT: All right. Well, you want to enter into
3 a stipulation to that effect?

4 MR. BELLIN: No, not at this point.

5 THE COURT: Okay. All right. Then we're going to
6 modify this. And to the extent that your client has any
7 documents that show the purchase of a list or having obtained
8 a list of the name and numbers of these folks to whom you sent
9 out the marketing material in that period for the State of New
10 York, I'll require you to turn that information over.

11 34, all documents containing the names and addresses
12 of witnesses, or potential witnesses regarding your sending or
13 causing to be -- causing to be sent marketing texts. I mean,
14 this to me is so -- I have no clue. It makes no sense to me.
15 What are you trying to get at here?

16 MR. BELLIN: I'm just trying to get at -- Your
17 Honor, if for them to identify all the witnesses. They don't
18 have to send to me all the documents. I don't know if from
19 Rule 26(a) they did or they did not.

20 THE COURT: All right.

21 MR. BELLIN: If they did, that's fine. If they did
22 not, that's what the discovery request is for.

23 THE COURT: Are you willing to make a representation
24 here that you turn over the information that was necessary in
25 your Rule 26 disclosures?

1 MR. OLSHAKER: Yes, I will.

2 THE COURT: All right. Then I'm not going to
3 require anything else.

4 35, all documents referring, relating or pertaining
5 to any person to whom the text message is attached as Exhibit
6 A to the complaint of substantially similar were delivered by
7 your sending, or causing to be sent, marketing texts on behalf
8 of the defendant.

9 MR. BELLIN: I withdraw that, Your Honor. That's
10 fine.

11 THE COURT: All right.

12 MR. BELLIN: And number 36 I withdraw as well.

13 THE COURT: All right.

14 38, all documents relating to any defenses the
15 defendant has in this case. And this says the defendant
16 objects to this request and that it seeks documents covered by
17 the attorney/client privilege.

18 Now to the extent that there are any documents that
19 the defendants intend to introduce at trial to support their
20 affirmative defenses, particularly the factual basis for those
21 defenses, you're required to turn those over or be precluded
22 from using them going forward.

23 So the choice is yours. You either produce them or
24 I -- you're going to put in the orders here if they're not
25 produced, you're precluded from using them at trial.

1 MR. OLSHAKER: We have turned over to the plaintiff
2 early on in this case the application that his client sent in
3 for funding, which we believe shows his prior express consent
4 to receive text messages.

5 THE COURT: That's the only affirmative defense
6 you're raising here?

7 MR. OLSHAKER: No, no. And also that the texting
8 system that they use is not under the law an automatic
9 telephone dialing system. I'm not sure what documentary
10 evidence I can produce that would support that defense.

11 THE COURT: Well, you should go back and think about
12 if you were actually ready for trial and putting your exhibit
13 list together exactly what would be on it in this regard.

14 MR. OLSHAKER: Okay.

15 THE COURT: And you're required to produce that.
16 And as I said, if you don't, you'll be precluded from doing
17 it.

18 And secondly, to the extent that you're claiming
19 that any documents are being withheld in this area on the
20 grounds of privilege, then you've got to provide a privilege
21 log. Did you do that?

22 MR. OLSHAKER: No, Your Honor.

23 THE COURT: All right. So a privilege log goes
24 along with this.

25 Number 40. Any and all documents, including, and

1 without limitation, logs, transmissions, text messages,
2 confirmation sheets, invoices, billing statements or telephone
3 bills, emails which reflect, state or otherwise list any or
4 all of the telephone number and/or other identifying
5 information of recipients of text messages that were delivered
6 by you, or anyone acting on your behalf, by sending, or
7 causing to be sent, marketing texts on behalf of defendants
8 from April 7, 2013 through April 7, 2017, who requested to no
9 longer receive text messages from the defendant.

10 I mean, by the time I got to the end of this I
11 didn't know what the beginning was.

12 MR. BELLIN: I'll withdraw it, Your Honor.

13 THE COURT: All right. I mean, to the extent that
14 anybody sends written notes, messages, et cetera back to the
15 defendant that they didn't want to receive text messages any
16 longer, certainly that would be relevant. But that's a much
17 more defined category than what you've got here so --

18 MR. BELLIN: Yes, Your Honor.

19 THE COURT: I'm marking that withdrawn.

20 43, all documents that contain, reflect or concern
21 the scripts, contents or wording of the text messages which
22 were delivered as a result of the defendant sending, or
23 causing to be sent, marketing texts on behalf of the defendant
24 from April 7, 2013 through 2017.

25 MR. BELLIN: I'll withdraw that. That's covered by

1 the previous order that Your Honor did.

2 THE COURT: All right. 44, all documents which
3 reflect the number of telephone calls the defendants or caused
4 to be made to cellular phones which were delivered as a result
5 of defendants sending of causing to be sent marketing texts on
6 behalf of the defendant from April 7, 2013 through April 7,
7 2017, which delivered the following text message or any
8 substantially similar message, "Whether Shore Funding has
9 funded you recently, or in the past, you're always eligible
10 rates are at an all time low. Text back for info. Funds by
11 the weekend."

12 There's a series of these that ask for the same --
13 the first part of the request is the same and it's only the
14 text message itself that's changed. And that is for 44, 45,
15 46. And so looking at this, this needs to be modified. I
16 think I understand what you're looking for.

17 To the extent that this -- that there are documents
18 that reflect the number of marketing texts with the same
19 message, or substantially the similar message as was texted to
20 the plaintiff -- and again, we're addressing this to the New
21 York group for now -- documents which reflect the number of
22 those marketing texts, I will require you to turn over.

23 The rest of the language in here is, to me,
24 completely unnecessary. I think that's what you're looking for,
25 correct?

1 MR. BELLIN: Yes, it is, Your Honor.

2 MR. OLSHAKER: I'm sorry. I'm not clear. The
3 documents --

4 THE COURT: If you have any documents that show the
5 number of marketing texts, the number, with the -- that were
6 sent out, basically, containing the same text message, or
7 substantially a similar text message, as went to the
8 plaintiff, within New York State. You're to produce that
9 information.

10 MR. OLSHAKER: Okay.

11 THE COURT: And that goes for the three of them, 43,
12 45 and 46.

13 Now continuing on here to the end of DE-56. You ask
14 for all discovery deadlines to be extended by 90 days. Ipso
15 facto, that's happening one way or the other.

16 So -- in fact, the discovery deadlines are on hold
17 for the moment until I can be assured that there's been
18 compliance with the orders I'm issuing today.

19 Let me go over then to 60, DE-60. Some of these
20 we've already addressed, so let me just go through this.

21 Document request here no. 17 is almost identical to
22 no. 18, and I've already ruled on that one. The same ruling
23 applies.

24 MR. BELLIN: Yes, Your Honor.

25 THE COURT: That takes me over to 41. Again, to me

1 -- well, let me put it this way. I will require the defendant
2 to respond but with a modified Rule 41 and here's what the
3 modification should be.

4 Documents including manuals, instructions,
5 descriptions, purchase orders or receipts for the machine,
6 device or software that the defendant used to send out the
7 marketing texts on behalf of the defendant in that time frame.
8 All right? That's key here, obviously, in light of your
9 primary defense in the case.

10 Number 42. All documents which describe or relate
11 to how the defendant used or caused to be used any machine,
12 device, software or any equipment used in conjunction with
13 such machine, device or software to send to cause to be sent
14 marketing texts, et cetera here.

15 You know, you get the response to the one before
16 that, then I think that's the information that you take to the
17 deposition and pursue further in terms of getting at what
18 you're looking for in 42 here.

19 I mean, to me this is another one that should have
20 been asked in an interrogatory, but you certainly had the
21 opportunity to pursue it at a deposition, specifically if you
22 get the proper response to the interrogatory before it.
23 So for the moment, I'm not requiring them to respond further
24 to 42.

25 47, all documents which contain, reflect or concern

1 the name of the internet provider, if any, used by the
2 defendant and or anyone working on the defendant's behalf to
3 make telephone calls to cellular phones to deliver text
4 messages.

5 I need to know why you need this.

6 MR. BELLIN: Because I'm going to need to know if
7 there are -- from that provider if there are records that show
8 to whom the calls were made.

9 In other words, the defendant may say well, these
10 are the calls that I made, but I made -- but we may find from
11 subpoenaing documents from the internet provider that other
12 calls were made. That they haven't sent them to us.

13 THE COURT: Well, are you claiming that they used an
14 internet provider to send out these messages?

15 MR. BELLIN: I'm not sure, Your Honor. I'm not sure
16 at all. I don't have any of the information because none of it
17 was turned over.

18 THE COURT: Well, do you know the answer to that
19 question.

20 MR. OLSHAKER: I do. He's referring to calls. This
21 is not a call case. This solely a --

22 THE COURT: It's a text.

23 MR. OLSHAKER: It's a text case. And I turned over
24 the name of the internet service provider long ago to them.

25 THE COURT: All right. If you turned over the

1 internet service provider's name, I'm not going to require
2 them to do anything else at this point.

3 MR. BELLIN: Okay, Your Honor.

4 THE COURT: You can -- again, that's an issue. If
5 you wish, you can take up at a deposition.

6 All right. I've already answered the question
7 raised about the -- the request raised here about nationwide
8 discovery.

9 I am not going to impose sanctions at this point,
10 but let me just make this very, very clear.

11 Mr. Olshaker, I'm giving you and your client until
12 April 12th to supply the documents and information that we
13 went through this morning in these two motions.

14 And I'm cautioning you that if I find there's been
15 non-compliance, or a lack of production, I'm going to start
16 imposing a daily fine on day 22 and then I'm going to have you
17 and your client in here for a hearing.

18 And so I expect you and your client to take this
19 very seriously and to do what I've instructed you to do today.

20 MR. BELLIN: As soon as I leave here, I'm headed
21 there to go over this with them.

22 THE COURT: Good. All right. That takes care of
23 the two motions.

24 What I want to do now is set up a telephone
25 conference with you for very shortly after this 21-day period

1 is up so that I can get an assessment of where things are.

2 So if you have your calendars -- I'd like to put
3 this on for -- let me just see here. April 19th -- no, no,
4 no. Never mind. I don't want to interfere with anyone's
5 religious observances. So let me just see. April 23rd at
6 10:30 for a telephone conference. Does that work?

7 MR. OLSHAKER: Yes.

8 MR. BELLIN: Yes, Your Honor. Thank you, Your
9 Honor.

10 THE COURT: Mr. Olshaker?

11 MR. OLSHAKER: That's fine.

12 THE COURT: Okay. All right. April 23rd, 10:30.
13 Mr. Bellin, I'm going to ask you to be responsible for
14 initiating that call, all right?

15 MR. BELLIN: Yes, Your Honor.

16 THE COURT: You'll get Mr. Olshaker on the phone and
17 call through to chambers.

18 All right. I'm holding the other discovery
19 deadlines in abeyance until I know these issues have been
20 resolved and then we'll put an amended schedule in place.

21 MR. OLSHAKER: Just to be clear, Your Honor, all of
22 the discovery that we'll be producing is subject to the
23 confidentiality order that was put into this case early on?

24 THE COURT: That's fine.

25 MR. OLSHAKER: Okay.

1 THE COURT: I mean, whatever is appropriate under
2 the order, is under the order, all right?

3 All right. Is there anything else we need to
4 address today while I have you both here? Mr. Bellin, let me
5 start with you?

6 MR. BELLIN: Nothing else, Your Honor. Thank you
7 very much.

8 THE COURT: All right. And Mr. Olshaker, anything
9 further?

10 MR. OLSHAKER: Nothing, Your Honor.

11 THE COURT: All right. We'll get the order up as
12 soon as we can and, hopefully, by the end of the day tomorrow
13 and you'll proceed from there. All right?

14 MR. OLSHAKER: Thank you.

15 MR. BELLIN: Thank you very much.

16 THE COURT: If you want the more amplified verison
17 of the record, you're certainly free to order a transcript.
18 My courtroom deputy can tell you what to do, all right?

19 MR. BELLIN: Thank you, Your Honor.

20 THE COURT: All right.

21 (Proceedings concluded at 11:51 a.m.)

1 I, CHRISTINE FIORE, court-approved transcriber and
2 certified electronic reporter and transcriber, certify that
3 the foregoing is a correct transcript from the official
4 electronic sound recording of the proceedings in the above-
5 entitled matter.

6
7 

8 _____ March 25, 2019

9 Christine Fiore, CERT

10 Transcriber
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25